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CITATIONS

518–829—73——1

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the portion of the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case that enlarged the remedies ordered by the Board.

OPINIONS BELOW

The opinion of the court of appeals (App. 1A-17A)[1] is reported at 476 F. 2d 546. The supplemental decision and order of the Board (App. 26A-44A) are reported at 191 NLRB No. 146. The earlier decisions of the court of appeals and of the Board

[1] "App." refers to the appendix to this petition.

are reported at 433 F. 2d 541 and 172 NLRB 2231, respectively.

JURISDICTION

The judgment of the court of appeals (App. 18A–23-A) was entered on April 26, 1973. The Board's timely petition for rehearing was denied on May 30, 1973 (App. 25A). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a remedial order of the National Labor Relations Board which is challenged by the charging party as inadequate to effectuate the purposes of the Act is entitled to the same respect by a reviewing court as an order challenged as going further than necessary to effectuate those purposes.

2. Whether the court of appeals exceeded its authority as a reviewing court by substituting its judgment for that of the Board concerning the appropriate remedy for unfair labor practices.

STATUTE INVOLVED

Section 10 of the National Labor Relations Act, 61 Stat. 146, 73 Stat. 544, as amended, 29 U.S.C. 160, provides in part:

> (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such

person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *.

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States * * * for the enforcement of such order * * *. Upon the filing of such petition, the court * * * shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * *

STATEMENT

A. THE INITIAL PROCEEDINGS

This case was twice before the Board. In the first instance, the Board determined that Heck's, Inc., had engaged in unfair labor practices in resisting, at its Clarksburg, West Virginia, retail store, the organizational drive of the respondent union. The Board found that Heck's had violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by interrogating and threatening employees concerning the union and by polling employees by a non-secret ballot to determine their support for the union, and that it had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to recognize and bargain with

the union despite the existence of valid authorization cards from a majority of the employees.[2] (172 N.L.R.B. 2231.)

The Board ordered Heck's to cease and desist from interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights. The Board also ordered the company to bargain with the union as the representative of the employees at its Clarksburg store and to post appropriate notices at each of its 11 stores (172 NLRB at 2232–2233, 2239). The Board denied the union's request for additional remedies, finding it "inappropriate in this proceeding to depart from our existing policies with respect to remedial orders" (*id.* at 2231, n. 2).

The court of appeals enforced the Board's order against the company (433 F. 2d 541). It remanded the case to the Board, however, for reconsideration of the union's request for additional remedies,[3] in light of

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[2] The Trial Examiner, finding that the General Counsel had failed to prove that the company lacked a good faith doubt of the union's majority status, had dismissed the refusal to bargain allegation of the complaint (172 NLRB at 2238). The Board, however, found that the company had engaged in "extensive violations" of the Act, and that this misconduct, which was "a flagrant repetition of conduct previously found unlawful" at its other stores, had "made it impossible to hold a free and fair election" (*id.* at 2232).

[3] The union requested the mailing of notices to employees; either a company-wide bargaining order or a shifting of the burden of proof in future cases to require Heck's to show good faith in rejecting union cards; injunctions under Section 10(j) of the Act; greater union access to employees; compensation to employees for collective bargaining benefits lost by delay; and reimbursement of union expenses incurred to overcome the effects of the company's unlawful refusal to bargain (433 F. 2d at 543, n. 7).

the court's recent decision in *Tiidee*.[4] In that case, the court had remanded to the Board for further consideration a union's request for similar extraordinary remedies where the company's "refusal to bargain was a clear and flagrant violation of the law" (426 F. 2d at 1248).

B. THE BOARD'S SUPPLEMENTAL DECISION

On remand, the Board amended its original order by granting some of the additional remedies requested by the union. It directed the company to mail notices of the Board's amended order to the homes of all employees at each of the company's locations; to provide the union, for a period of one year, with reasonable access to plant bulletin boards at all company locations for the posting of union notices, bulletins, and other organizational literature; and to furnish the union with a list of the names and addresses of all company employees at all store locations, to be kept current for a period of one year (App. 41A–42A).

The Board denied the further relief sought by the union, including its request that it be reimbursed for organizational costs and litigation expenses incurred by reason of Heck's unlawful conduct (App. 38A–39A). The Board was not "unmindful of the probability that the Charging Party has spent more money on organizational costs and attorney's fees than it

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[4] *International Union of Electrical, Radio and Machine Workers, AFL–CIO* v. *National Labor Relations Board* (*Tiidee Products, Inc.*), 426 F. 2d 1243 (C.A. D.C.), certiorari denied, 400 U.S. 950.

would have spent had the Respondent not refused to bargain" (App. 38A). It concluded, however, that it would not "effectuate the policies of the Act to require reimbursement with respect to such costs in the circumstances here" (*ibid.*). The Board explained that the appropriateness of these reimbursement requests must be considered in the light of "the role of a charging party under the statutory scheme," and the basic principles that "Board orders must be remedial not punitive"[5] and that "collateral losses are not considered in framing a reimbursement order"[6] (App. 38A–39A).

The Board had concluded with respect to another of the union's requests that, "[a]lthough the Respondent's unfair labor practices have been widespread, aggravated, and pervasive, they have not in our opinion been so widespread, pervasive, or aggravated as to warrant such extraordinary relief as a companywide bargaining order not based on proof of majority" (App. 34A). It reached a similar conclusion with respect to the extraordinary relief of reimbursement (App. 39A):

> [T]he statutory scheme involves an interblending of public and private interests, and the participation of a charging party in the proceedings, before the Board and in the courts, can serve a public as well as its own private interests. Nonetheless, it is the Board which has been given primary initial responsibility to de-

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[5] Citing *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U.S. 7, 11–12.

[6] Citing *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 364.

> termine and protect the public interest in the elimination of obstructions to commerce resulting from labor disputes. Such protection of the public interest as may result from the charging party's participation in litigation must be regarded, we believe, as incidental to its efforts to protect its own private interests. Given this statutory framework, we conclude that the public interest in allowing the Charging Party to recover the costs of its participation *in this litigation* does not override the general and well-established principle that litigation expenses are ordinarily not recoverable. [Emphasis added.]

C. THE SUPPLEMENTAL DECISION OF THE COURT OF APPEALS

The court of appeals enforced the Board's amended order and agreed in part with the Board's rejection of the union's other requests for extraordinary relief. It concluded, however, that reimbursement of organizational costs and litigation expenses would be appropriate in the circumstances of this case. Rather than remanding the case for further consideration of those remedies in light of its opinion, the court enlarged the Board's order to include such reimbursement and remanded solely for a compliance-stage determination of the amounts involved (App. 17A, 21A).

The court rested its decision with respect to reimbursement on its reading of the Board's supplemental decision in *Tiidee,* 194 NLRB 1234, which was issued subsequent to the Board's supplemental decision in this case. As the court viewed it, the Board in *Tiidee* retreated from its rationale in this case by

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ordering reimbursement of a union's litigation expenses by an employer who interposed patently frivolous defenses to an unfair labor practices complaint. Although the Board had never suggested that Heck's defenses in this case were insubstantial, the court reasoned that "the considerations which motivated the Board to give this enlarged relief in *Tiidee* are also operative here" (App. 9A–10A).

> It would appear that the Board has now recognized that employers who follow a pattern of resisting union organization, and who to that end unduly burden the processes of the Board and the courts, should be obliged, at the very least, to respond in terms of making good the legal expenses to which they have put the charging parties and the Board. We hold that the case before us is an appropriate one for according such relief. [App. 10A.]

Similarly, the court thought that *Tiidee* signaled a shift in the Board's position with respect to reimbursement of excess organizational costs (App. 11A). The court attached controlling significance to the fact that the Board in *Tiidee,* while refusing to order such reimbursement, found it sufficient to observe that there was "no nexus between Respondent's unlawful conduct * * * and the Union's preelection organizational expenses" (194 NLRB at 1236). The court reasoned that, since the Board acknowledged the probability of such a nexus in the present case, "we think that provision for such costs should have been included in the remedies fashioned by the Board on remand" (App. 11A).

REASONS FOR GRANTING THE WRIT

This case presents an important issue of administrative law which this Court has not previously addressed—the permissible scope of a court's authority to review an agency's remedial order which is attacked as inadequate to remedy the violation. If, as we submit, the same standards apply regardless of whether the order is challenged as going too far or not far enough, then the court below has departed from its permissible role by substituting its judgment for that of the Board concerning the appropriateness in this case of an order requiring reimbursement for organizational and litigation expenses. The principles underlying the decision below could seriously impair the effective administration of the labor laws by restricting the Board's authority to fashion appropriate relief in accordance with its informed judgment.

1. In the usual case in which the remedy of an administrative agency is challenged, the claim is that the agency has gone too far, either because it has no authority to take the action or because on the particular facts the action was unnecessary and inappropriate and thus constituted an abuse of discretion. In a wide variety of situations, this Court has recognized that agencies have broad discretion to devise appropriate remedies, and that their orders are subject to judicial modification only "where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613. See, also, *Butz* v. *Glover Livestock Commission Co.*, No.

71–1545, decided March 28, 1973, slip op., p. 4. "The court may decide only whether, under the pertinent statute and relevant facts, the [agency] made 'an allowable judgment in [its] choice of the remedy'" (*Butz, supra,* slip op. at p. 7, quoting from *Siegel, supra,* 327 U.S. at 612).

The present case is the converse situation. Here the claim is that the agency's remedy was improper because it did not go far enough. This Court has not previously considered the proper scope of judicial review when agency action is challenged in that context. There is no reason, however, why the principles developed in cases in which agency orders have been challenged as excessive should not also apply when they are attacked as inadequate. In either situation the controlling consideration is that Congress has left it to the agency's discretion to determine what relief is necessary to cure the violations found, and that discretion necessarily comprehends deciding not only what is necessary but also what is unnecessary. It is a "fundamental principle * * * that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" *American Power Co.* v. *Securities and Exchange Commission,* 329 U.S. 90, 112; *Butz* v. *Glover Livestock Commission Co., supra,* slip op. at p. 7; *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U.S. 177, 194. Drawing the outer limits of the remedy implicates no less important policy considerations than determining what minimum affirmative steps must be taken.

2. Section 10(c) of the Act "charges the Board with the task of devising remedies to effectuate the policies of the Act." *National Labor Relations Board* v. *Seven-Up Bottling Co.,* 344 U.S. 344, 346. This Court has stated that, "[i]n fashioning its remedies under the broad provisions of § 10(c) * * *, the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *National Labor Relations Board* v. *Gissel Packing Co.,* 395 U.S. 575, 612, n. 32. See, also, *Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* 379 U.S. 203, 216. The Board's remedy thus may not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *National Labor Relations Board,* 319 U.S. 533, 540.

Unless different standards apply where the Board's remedy is challenged as inadequate, the court below plainly exceeded its authority by enlarging the remedies chosen by the Board in this case. The court did not—and on this record could not—find that the order was "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act" (*Virginia Electric & Power Co., supra*), or that it had "no reasonable relation to the unlawful practices found to exist" (*Jacob Siegel Co., supra*), or that it was a "patent abuse of discretion" (*Moog Industries, Inc.* v. *Federal Trade Commission,* 355 U.S. 411, 414). To the contrary, the Board's remedies were carefully fashioned to fit the special facts of this case

and to further the policies of the Act. Indeed, those remedies—requiring Heck's to mail notices to its employees' homes, to provide access to company bulletin boards at all its stores, and to furnish a current list of all its employees—went well beyond the remedies normally provided for the kinds of unfair labor practices committed in this case.

The Board's refusal to order reimbursement of litigation and organizational expenses was "an allowable judgment" (*Jacob Siegel Co., supra,* 327 U.S. at 612) that should not have been overturned. It was a proper exercise of the Board's wide remedial discretion to determine that the violations in this case were not so aggravated and their effects not so broad as to require reimbursement of these expenses to the union. The court, by rejecting that judgment, has departed from the proper standards. "For reviewing courts to substitute * * * their [own] discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for it would 'propel the court into the domain which Congress has set aside exclusively for the administrative agency.' " *National Labor Relations Board* v. *Metropolitan Life Insurance Co.,* 380 U.S. 438, 444.

3. The court was in error in concluding that the Board's decision in *Tiidee* undercut its rationale for denying reimbursement in this case. The Board found in *Tiidee,* and did not find here, that the employer's defenses to the unfair labor practice charges were frivolous. It ordered reimbursement of the union's

litigation expenses "in order to discourage future frivolous litigation" (194 NLRB at 1236). "The policy of the Act to insure industrial peace through collective bargaining can only be effectuated when speedy access to uncrowded Board and court dockets is available" (*ibid.*).

In a case like this one, however, where the employer, though charged with serious misconduct, tenders a plausible and substantial defense,[7] the public interest in "uncrowded Board and court dockets" collides with the right of a respondent to obtain an adjudication of the issues he presents. In those circumstances, it is not unreasonable for the Board to adhere to the traditional American rule that "attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *Fleischmann Distilling Corp.* v. *Maier Brewing Co.,* 386 U.S. 714, 717. See, also, *Hall* v. *Cole,* No. 72-630, decided May 21, 1973, slip op., p. 3.[8]

Similarly, *Tiidee* represents no change of policy with respect to excess organizational expenses. The refusal of the request for such relief in *Tiidee*—based on the

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[7] As the Board noted (App. 37A), Heck's "introduced testimony which if fully credited and given its broadest possible sweep, would have resulted in the rejection of sufficient cards to have vitiated the Union's majority claim." Moreover, the Trial Examiner found other grounds for sustaining the company's defense to the refusal to bargain allegation of the complaint (*supra*, p. 4, n. 2).

[8] Indeed, the court of appeals itself recognized the propriety of drawing such a distinction between frivolous and non-frivolous litigation. It upheld on this basis the Board's refusal to order Heck's to reimburse the union's members for benefits lost as a consequence of Heck's refusal to bargain (App. 14A-17A).

Board's finding that there were no excess costs attributable to the employer's unlawful conduct—is wholly consistent with the Board's determination here that, despite the probability that there were some excess organizational costs, the Act's policy would not be furthered by ordering reimbursement on the facts in this record. The only difference between the cases is that in *Tiidee* the Board found it unnecessary to consider the appropriateness of the remedy on the facts there, because it was clear that no excess costs were incurred.

Even if there were an inconsistency between the decisions, however, the court below should not have resolved it without first obtaining the views of the Board. And if it considered that the Board had not adequately explained its reasons for denying reimbursement in this case, the appropriate course would have been to remand the case again to give the Board an opportunity to state those reasons.[9] See *Metropolitan Life Ins. Co., supra.*

4. The decision below, if it is permitted to stand, is likely to have a substantial impact on the Board's capacity effectively to administer the Act. Since any person aggrieved by a Board order "denying in whole or in part the relief sought" may obtain review in the

[9] The Board might have explained in more detail, for example, that the other relief ordered would adequately remedy the effects of the company's misconduct; or that the existence and amount of any excess organizational expenses would be impossible to determine, because such a determination would require speculation as to what would have happened had there been no unlawful activity (*e.g.*, possibly more vigorous *lawful* activity); or that to award relief so speculative in nature might invite collateral litigation that would burden the Board's docket.

District of Columbia Circuit (Section 10(f) of the Act, 29 U.S.C. 160(f)), the inevitable consequence of this decision will be a substantial number of cases in that circuit challenging the Board's refusal to grant extraordinary relief. Given that court's apparent disposition to sustain such challenges, as evidenced by its decisions in this case and in *Tiidee,* review by this Court is necessary to preserve the Board's statutory discretion with respect to fashioning remedial orders.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1973.

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1550

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347
AMALGAMATED MEAT CUTTERS

AND

BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Petition for Review of Order of National Labor Relations Board

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Decided March 21, 1973

Before Bazelon, *Chief Judge*, and McGowan and Leventhal, *Circuit Judges.*

Opinion for the Court filed by McGowan, *Circuit Judge.*

McGowan, *Circuit Judge:* In this direct review proceeding under the National Labor Relations Act, we are concerned only with remedies. The wrongs—consisting of Section 8 (a)(1) and (5) violations—were before us in *Food Stores Employees Union, Local 347 v. NLRB*, 433 F.2d 541 (1970). We there granted enforcement of the Board's order, but, in response to the Union's contention that the Board should have gone further in providing adequate relief, we remanded the case to the Board for reconsideration of the Union's requests in this regard. Although the Board has increased somewhat the range of the relief granted by it initially, the Union has renewed its complaint to this court that the Board has fallen short of proper effectuation of the policies of the Act. To the limited extent hereinafter indicated, we find this to be true; and we enlarge the remedies accordingly.

I

The employing company, Heck's Incorporated, is not a stranger to the processes of the Board. Operating a chain of discount stores in the Southeast, this is the eleventh time that its resistance of union organization has embroiled it in Board proceedings.[1] In none has it prevailed

[1] The long history of this struggle is as follows: Heck's Discount Store, 150 NLRB 1565 (1965), *enforced per curiam*, 369 F.2d 370 (6th Cir. 1966); Heck's Inc., 156 NLRB 760 (1966), *enforced as modified*, 386 F.2d 317 (4th Cir. 1968); Heck's Inc., 158 NLRB 121, *enforced per curiam*, 387 F.2d

at the Board level, and its fortunes in the Courts of Appeals have been only marginally better.[3] In its first opinion in this case, the Board characterized Heck's as having "a labor policy in all its stores that is opposed to the policies of the Act." In its Supplemental Decision following upon our remand, the Board asserts that "it is by now clear that [Heck's] conduct here is but part of a pattern of unlawful antiunion conduct engaged in by [Heck's] top officials throughout [its] entire operations for the purpose of denying to all of its employees the exercise of those rights guaranteed the employees by Section 7 of the Act;" and, viewing Heck's conduct not "in isola-

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65 (4th Cir. 1967); Heck's Inc., 159 NLRB 1151 and 159 NLRB 1331 (1966), *consent decree entered* (4th Cir. No. 11,390 June 13, 1967); Heck's Inc., 166 NLRB 186 and 166 NLRB 674 (1967), *enforced as modified,* 390 F.2d 655 (4th Cir. 1968) and 398 F.2d 337 (4th Cir. 1968), *modified and remanded sub. nom.* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969); Heck's Inc., 170 NLRB 178 (1968), *enforced in part, remanded in part in light of* NLRB v. Gissel Packing Co., *supra,* 418 F.2d 1177 (D.C. Cir. 1969); Heck's Inc., 171 NLRB 777 (1969); Heck's Inc., 172 NLRB No. 255 (1969), *enforced in part, remanded in part,* 433 F.2d 541 (D.C. Cir. 1970); Heck's Inc., 174 NLRB 951 (1971).

[3] The Fourth Circuit refused to enforce an 8(a)(5) order to bargain in NLRB v. Heck's Inc., 386 F.2d 317 (4th Cir. 1967), on the ground that the card majority had been obtained through improper participation of supervisory personnel. In N.L.R.B. v. Heck's Inc., 398 F.2d 337 (4th Cir. 1968), the court declined enforcement of an order to bargain, but that decision was reversed by the Supreme Court *sub. nom.* N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1969). This court, while enforcing the Board's order in part in Food Store Emp. U., Loc. 347, Amal. Meat Cut. v. NLRB, 418 F.2d 1177 (1969), remanded, in light of *Gissel,* for further findings as to whether the employer's refusal to bargain was accompanied by independent unfair labor practices which precluded a fair election.

tion" but "in the total context," the Board characterized Heck's unfair labor practices as "clearly aggravated and pervasive."

The unfair labor practices involved in this case grew out of the Union's effort to organize the employees of Heck's store in Clarksburg, West Virginia. The 8(a)(1) violation was found by the Board to reside in unlawful questioning and threatening of employees, and management polling by nonsecret ballot to ascertain the degree of employee support for the Union. The 8(a)(5) dereliction consisted of a refusal to bargain despite the existence of cards showing a majority in favor of the Union. The remedies initially afforded by the Board included a bargaining order, and the conventional command that the employer cease and desist from interfering with Section 7 rights. Appropriate notices of the relief given were directed to be posted at all of Heck's stores.

The Union's requests for additional relief at issue on the remand were as follows:

1. A copy of the notices ordered to be posted should also be sent to the home of each Heck's employee, and the president and vice-president of Heck's should be required to read the notices to employees at all Heck's locations.

2. To facilitate Union access to employees, Heck's should (a) provide the union with a list of names and addresses of all its employees; (b) afford the Union access to company bulletin boards and other posting places; (c) permit Union use of employer facilities in non-working parts of the stores during non-working hours; and (d) permit the Union to call a meeting in each store on company time in facilities customarily used for employee meetings.

3. Heck's should be ordered to bargain with the Union on a company-wide basis, *i.e.*, the Board should recognize a bargaining unit encompassing all the stores in the Heck's chain.

4. The General Counsel should be ordered to seek

injunctions under § 10(j) of the Act whenever a complaint issues against Heck's.[a]

5. Heck's should be ordered to reimburse employees for the loss of wages and fringe benefits that would have obtained if it had not flagrantly violated § 8(a)(5) by refusing to bargain about a contract.

6. Heck's should be ordered (a) to pay the Union the amount of dues and fees which would have been paid by the employees of the Clarksburg store during the period of Heck's refusal to bargain; and (b) to compensate the Union for its litigation expenses, including reasonable attorney's fees, and for excess organization expenses caused by the unfair labor practices to which it was subjected.

The proceedings upon remand consisted of the receipt by the Board of statements of position from the General Counsel, the Union, and Heck's. After consideration of these statements, the Board issued a Supplemental Decision and Amended Order, which enlarged the remedies in the following respects:

1. The notices required to be posted at all of Heck's stores are also required to be mailed to each employee at his home.

2. The Union is to be afforded access for a one-year period to Heck's bulletin boards, and other places

[a] In its Supplemental Decision, the Board at the outset noted that the Union requested this particular relief and the General Counsel opposed it, and thereafter made no further reference to the matter. Similarly, there was no discussion of this item by either the Union or the Board in their briefs and arguments before us. In these circumstances we do not pursue the matter, except to remark that the General Counsel's statement on remand emphasizes his continuing sensitivity to the obligations imposed upon him by Section 10(j). He also pointed out that the final order to be entered by the Board in this case runs against Heck's, and cannot operate to impose obligations on the General Counsel. It may be that the matter was not pressed upon the Board in the light of these representations.

where notices to employees are customarily posted, for the posting of Union notices, bulletins, and other organizational literature.

3. The Union is to be furnished by Heck's with a list of all of its employees' names and addresses, such list to be kept current for a one-year period.

Dissatisfied with the degree to which the Board thus moved in the direction of meeting its requests, the Union petitioned for review in this court. The Board has responded in defense of its actions, but Heck's, although its position on remand was that no additional relief was in order, has not intervened and is not now before us.

II

We turn first to the controversies that remain with respect to non-monetary relief. All of the additional relief given on remand was of that character, and it is now unchallenged. The Union does not appear to press its contention that the notices—now required to be mailed as well as posted—also be read by the company officers; and we do not, in any event, disturb this exercise of the Board's discretion. The union does complain of the failure to give it access to the employees on company property. The Board was of the view that this privilege was not demonstrably necessary to the effectiveness of the Union's organizing efforts, especially in the train of the Board's action in requiring that the Union be furnished with the list of employees' names and addresses. Until this latter expedient had been tried and found wanting, the Board thought that the problems inevitably attendant upon Union activity on company property need not be anticipated. This is an exercise of judgment which we are not disposed to overturn.

The Union also persists in its assertion that the bargaining order, which presently embraces only the unit

at the Clarksburg location, should be made company-wide. The Board, emphasizing that the Union's organizing campaign has been, as in the case of Clarksburg, conducted on a store-by-store basis, and that there is no claim that the Union represents a majority of all the employees or a majority in any location other than those presently covered by bargaining orders,[4] alludes to the novelty of this kind of relief, especially in the light of Section 7's explicit guarantee of the right of employees to refrain from representational bargaining.

Despite the unrelieved history of the omission of this device from the Board's remedial arsenal, the Board has purported to consider the proposal on its merits. Its conclusion was that the Union's very success in gaining majorities in a number of single locations indicates that its potential for successful organization elsewhere is substantial—a potential which, indeed, has been presumably increased by the enlarged relief currently being given. Under these circumstances, the Board thought it both unnecessary and unwise to risk trenching upon the policies of Section 7 in the absence of proof that the Union would be helpless without this extraordinary relief. These con-

[4] Neither do we disturb the Board's rejection of a related Union proposal, which was supported by the General Counsel, that the Board enter *now* a bargaining order with respect to any single-store unit as to which the Union *hereafter* secures a card majority or otherwise achieves bargaining rights. The Board, in addition to believing that this was not essential to the employees' ability in the future freely to choose their bargaining representatives, pointed out that disputes over representation issues would, under this approach, presumably have to be decided by the courts of appeals acting with the aid of special masters—a circumstance that promises neither greater expedition in handling nor more expert resolution in result. We have no warrant to fault the Board for taking these considerations into decisive account.

siderations seem to us rational in nature and well within the range of respect traditionally to be accorded by us to the Board's determinations.[5]

III

The remaining components of the Union's prayer for additional relief involve monetary compensation. They are four in number.

1. Legal Fees and Litigation Expenses.

It is the Union's submission that, where it is necessary to exhaust legal procedures in order to attain rights accorded it by the Act, it should be reimbursed for its counsel fees and other litigation expenses, at least in respect of an employer who, like Heck's, has been found by the Board to have engaged in a deliberate "pattern of unlawful antiunion conduct." The Board, however, stressed the fact that the Act assigns the laboring oar to the General Counsel in the prosecution of an unfair labor practice charge, and that the participation of the charging party is not central to the public purposes of the statute but, rather, incidental to that party's efforts to assure protection of its own private interests. With this statutory framework, said the Board, "the public interest in allowing the Charging Party to recover the costs of its participation in this litigation does not override the general and well-established principle that litigation expenses are ordinarily not recoverable."

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[5] N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 612 n. 32 (1969); Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203, 216 (1964); International Union of Electrical Workers v. N.L.R.B., 426 F.2d 1243, 1250 (D.C. Cir. 1970), *cert. denied,* 400 U.S. 950.

There are, it seems to us, obvious difficulties with this approach, certainly in the case of an employer who appears to look upon litigation as a convenient means of delaying—and thereby perhaps avoiding—the fatal day of union recognition and collective bargaining. We need not pursue those difficulties in detail, however, for the reason that the Board itself has subsequently departed from the rationale upon which its refusal of litigation expenses in this case is based. In its Supplemental Decision and Order, 194 NLRB No. 198, issued after remand by this court in *International Union of Electrical, Radio & Machine Workers, AFL-CIO v. NLRB* (Tiidee Products, Inc.), 426 F.2d 1243 (1970), *cert. denied*, 400 U.S. 950 (1970), the Board ordered the additional relief of payment to both the labor organization and the Board of their litigation expenses in both the Board and court proceedings.

In doing so the Board reasoned that the Congressional objective of achieving industrial peace through collective bargaining "can only be effectuated when speedy access to uncrowded Board and court dockets is available." It went on to conclude that, "in order to discourge future frivolous litigation, to effectuate the policies of the Act, and to serve the public interest we find that it would be just and proper" to order reimbursement of both the Board and the Union for their expenses incurred in the investigation, preparation, presentation, and conduct of the cases before it and in this court.[*]

We think the considerations which motivated the Board to give this enlarged relief in *Tiidee* are also operative

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[*] These reimbursable expenses were described by the Board as "reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses."

here. Although the Board in its Supplemental Decision in this case has nowhere characterized the litigation as frivolous, it has used the language of "clearly aggravated and pervasive" misconduct; and in its original opinion it questioned Heck's good faith because of its "flagrant repetition of conduct previously found unlawful" at other Heck's stores. It would appear that the Board has now recognized that employers who follow a pattern of resisting union organization, and who to that end unduly burden the processes of the Board and the courts, should be obliged, at the very least, to respond in terms of making good the legal expenses to which they have put the charging parties and the Board. We hold that the case before us is an appropriate one for according such relief.

2. *Organizing Costs.*

In its Supplemental Decision after remand, the Board lumped litigation expenses and excess organizational costs together in its discussion. It prefaced that discussion by saying that ". . . we are not unmindful of the probability that the Charging Party has spent more money on organizational costs and attorneys' fees than it would have spent had [Heck's] not refused to bargain."[7] It concluded, however, not to make any allowances in this regard for the reasons articulated by it in denying litigation expenses. This rationale, as we have seen, generally turned upon what the Board considered to be the subordinate role of a charging party in the scheme of the Act.

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[7] In his statement of position on remand, the General Counsel supported the Union's entitlement to extraordinary organizational costs. His comment was that where the Union was required by Heck's unfair labor practices "to expend additional funds in organizational activity over and above those normally required . . . [Heck's] should be ordered to reimburse the Union for these additional expenditures."

As in the case of litigation expenses, the Board, upon remand in *Tiidee,* has shifted its ground with respect to organizational costs. In its Supplemental Decision in *Tiidee,* the Board did not allow the claim for excess organizational expenses, but it justified that action solely on the ground that ". . . the Union was selected by the employees after a 2-month campaign at the first election held;" and, because of this circumstance, the Board found ". . . no nexus between Respondent's unlawful conduct here under examination and the Union's preelection organizational expenses . . ." Thus, in *Tiidee* the Board appears to have denied organizational costs because it believed that, on the facts of that case, no unusual organizational costs had been incurred.

This obviously is quite a different thing from saying that the policies of the Act forbid the allowance of such costs in cases like the one before us, where the Board has in terms indicated its awareness of "the probability" that such costs were experienced by reason of Heck's intransigence. Under these circumstances we find nothing in the Board's Supplemental Decision which constitutes an adequate justification for the denial of extraordinary organizational costs to which the Union was exposed by reason of Heck's policy of resisting organizational efforts and refusing to bargain; and we think that provision for such costs should have been included in the remedies fashioned by the Board on remand.[8]

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[8] Counsel for the Board in their brief in this court attempt to supply a number of reasons why excess organizational costs should not be taken into account, such as their assertedly speculative nature and their invitation of collateral litigation which burdens the Board's administration of the Act. These are counsel's reasons, not the Board's; and, under familiar principles of judicial review of administrative agencies, we appraise the Board's actions only in terms of the latter.

3. *Union Dues and Fees.*

In its Supplemental Decision dealing with the Union's claim that it should be reimbursed for union dues and fees lost by it during the period when Heck's was refusing to bargain, the Board asserts that the only predicate for such relief would be a finding by it that, had there been bargaining, it would have resulted in the inclusion of a union security clause which would have required payment of dues and fees as a condition of continued employment. The Board concludes that "[W]hile the execution of such an agreement is of course a possibility, we cannot conclude that it is so strong a probability that any loss of dues or fees must be deemed to have resulted from [Heck's] unlawful refusal to bargain."[9]

The Union, in challenging this conclusion, argues alternatively that (1) the likelihood of the successful negotiation of a union security clause is substantial in the light of the prevalence of such clauses in collective bargaining agreements, or (2) even if it be assumed that no such contract would have ensued, the willingness of Heck's to bargain at all would have resulted in the voluntary payment of union fees and dues by at least some of the 26 employees who signed the authorization cards.

We have difficulty with each of these hypotheses. It is undoubtedly true that union security clauses have attained a wide degree of use, but it also remains true that an employer may bargain to impasse with respect to such a

[9] The Board raised, although it pretermitted, a question as to its power to provide a remedy in respect of union dues and fees, because of the restrictions on payments by employers to employee representatives imposed by Section 302 of the Act. Because of the disposition we make of this claim we need not pursue this issue of authority, although it would appear that Section 302 is addressed to other circumstances than those involved here.

demand, and that the Board may not impose that obligation upon the employer. *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). We also think it speculative in the extreme to suppose that employees would voluntarily begin paying initiation fees and dues to a union which has been denied recognition and failed to produce a contract. There is nothing in the record to show—and the Union does not represent to us—that it made any effort to assess dues and fees during the period of its travail with Heck's. In the absence of such evidence, there is some reason to suppose that union policy, generally and in the case of the Union here involved, is not to make any effort to collect dues and fees, at least in the case of newly organized employees, until the fruits of union membership are brought home in the form of a signed agreement.[10]

It would, in any event, present formidable problems of proof to try to determine at this late date which employees would, if they had been asked, have paid fees and dues during the period in question. Short of assuming that all would have done so—an assumption for which there seems little foundation in the realities of human nature—

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[10] In its rejection of a claim of this kind on remand in *Tiidee*, the Board noted that the labor organization involved in that case had asserted that ". . . because it is union policy not to collect initiation fees and dues until a contract is executed, it has received nothing from the unit employees throughout the course of this proceeding . . ." The Board purported first to view this claim as "partaking of a request for a make-whole remedy, which we have declined to order, since presumably the dues and fees sought would have come from lost wages . . ." Although it may be that the Board here is confusing the substantive merits of a make-whole remedy with the wholly manageable problem of preventing a double recovery, the Board went on to conclude that, since the union as a matter of policy did not seek initiation fees and dues prior to negotiation of a contract, it saw no reason to cause the employer to assume the risk of that passivity.

the inquiry would be an exercise in futility. In any event, the loss, if any, of such dues and fees will, we think, be offset to some extent by the relief we have directed in respect of extraordinary organizational costs.[10a]

4. *Compensation for Lost Benefits.*

The additional remedy of making its members whole for the wage and other fringe benefits which might have accrued from the bargaining process is the matter principally pressed by the Union. In its Supplemental Decision, the Board initially reiterated its position, stated in *Ex-Cell-O Corporation*, 185 NLRB No. 20, that it was wholly lacking in statutory authority to give relief of this nature. However, it went on to conclude that, even if it had the power to act, this would not be an appropriate case in which to do so. It pointed to the opinions of this court subsequent to *Tiidee* in which we have held the make-whole remedy inapplicable where the refusals to bargain rested on "debatable" issues, as contrasted with those which we, as in *Tiidee*, have characterized as "patently frivolous."[11] Referring to the precise circumstances

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[10a] In Bangor & Aroostock R. Co. v. BLFE, 442 F.2d 812 (1971), this court held that dues and fees could be recovered by a union as damages in respect of improper job abolitions. A union shop clause in the collective bargaining agreement there involved made it plain that, but for the employer's action, dues and fees would have been paid. The uncertainty claimed was whether men hired to fill the positions would have joined the plaintiff union rather than its competitor. The court there thought that the evidence supported a reasonable inference that they would, thereby justifying the placing of the burden of proof as to the uncertainty on the employer. In the case before us, union policy would have resulted in no receipt of dues and fees even during an unduly prolonged bargaining period.

[11] International Union, UAW v. NLRB (Ex-Cell-O Cor-

of this case, the Board concluded that the latter category did not embrace a defense which failed solely by reason of the credibility determinations of the Trial Examiner.

The union, although harassed from the beginning of its organizing campaign at the Clarksburg store, within a few days represented to Heck's that it had in hand the signed authorization cards of a majority of the employees; and it requested recognition and bargaining. The response of Heck's was to file a petition for an election. When the election was held some six weeks later, the Union lost by a vote of 16 to 19, although this result was subsequently nullified by reason of the employer's unfair labor practices. The Trial Examiner found that the General Counsel had failed to prove that Heck's lacked a good faith doubt of the Union's majority status and that, accordingly, there was no 8(a)(5) violation.

In making this determination, the Trial Examiner focused first on the substance of Heck's refusal to recognize the Union on the basis of the cards. The administrative hearing record shows that Heck's introduced testi-

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poration) 449 F.2d 1046, 449 F.2d 1058 (1971); Steelworkers v. NLRB (Quality Rubber Mfg. Co.), 430 F.2d 519 (1970); Amalgamated Clothing Workers v. NLRB (Levi Strauss & Co.), 441 F.2d 1027 (1970).

In *Ex-Cell-O,* the union requested and won the election, but the employer refused recognition on the basis of union activity which allegedly precluded a fair election. In *Quality Rubber,* the employer refused recognition on the basis of cards, but did not seek an election. The result turned on issues of credibility which, although resolved against the employer, were found to be consistent with good faith. In *Levi Strauss & Co.,* the union requested an election after the employer refused recognition on the basis of cards. The union lost, but the employer was ordered to bargain because it was found to have engaged in unfair labor practices during the period preceding the election. Again the resolution turned on conflicting testimony.

mony by certain employees as to intimidation and other circumstances which, if it had been believed, would have eliminated enough cards to vitiate the majority status claimed by the Union. Although the Trial Examiner ultimately found each of the cards to have been validly obtained, he noted that the determination turned upon some close questions concerning the credibility of witnesses. The Trial Examiner also emphasized the fact that Heck's had promptly filed an election petition after the demand was made, and that Heck's had had some prior experience with card-based bargaining demands from the Union which later proved unwarranted.[12]

The Board took its stand principally upon what it termed to be the long history of disregard by Heck's generally of its obligations under the Act. Thus the Board's finding of bad faith was based not on a determination that Heck's objections to this particular demand for recognition were insubstantial, but rather on Heck's repetition in the period preceding the election of conduct found in prior proceedings to have been illegal. We agree with the Board's conclusion that an employer's good faith must be judged in the entire context of its behavior, and indeed our determination that some additional remedies are required in this case is based on Heck's consistent and repeated demonstration of antiunion animus. However, the factors which influenced the Trial Examiner on the issue of good faith remain undisturbed by the Board's decision and are relevant to the appropriateness of the make-whole remedy.

In the light of these circumstances, we are not inclined to say that the Board's treatment of this issue on remand is beyond the wide range of latitude traditionally accorded

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[12] Heck's Inc., 159 NLRB 1151, 159 NLRB 1331, *consent decree entered* (No. 11,390, 4th Cir. June 13, 1967); N.L.R.B. v. Heck's Inc., 386 F.2d 317 (4th Cir. 1968).

the Board in the matter of remedies. The Supreme Court, although ultimately accepting the signed card approach in *Gissel* as a basis for creating the recognition and bargaining obligation, did at the same time refer to cards as "admittedly inferior to the election process." The employer here appears to have had some basis for questioning the result of the card approach, and it exhibited its readiness to invoke the election process. We do not, accordingly, revise the Board's failure to provide an additional remedy in the form of a make-whole provision.[13]

We grant enforcement of the Board's Amended Order, as the same shall be further enlarged upon remand by the inclusion of the additional remedies of litigation costs and organizational expenses discussed hereinabove.

It is so ordered.

[13] The Board is equipped with a broad arsenal of remedies which it may employ in the case of a persistent violator. Rather than require application of such remedies on an all-or-nothing basis, it seems to us preferable to preserve sufficient flexibility to adjust the relief granted to the particular facts of each case. There are, as in everything else, degrees of flagrancy—and variations in its pattern.

APPENDIX B

[Received April 2, 1973, Hugh E. Kline, Clerk]

[Filed April 26, 1973, Hugh E. Kline, Clerk]

United States Court of Appeals for the District of Columbia Circuit

No. 71-1530

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Judgment

Before BAZELON, Chief Judge and MCGOWAN and LEVANTHAL, Circuit Judges

THIS CAUSE came on to be heard upon a petition of Food Store Employees Union, Local 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO to review an amended order of the National Labor Relations Board dated July 1, 1971, against Heck's Inc., its officers, agents, successors and assigns. The Court heard argument of respective counsel on April 17, 1973, and has considered the briefs and transcript of record filed in this case. On March 21, 1973, the Court, being fully advised in the premises handed down its opinion granting en-

forcement of the Board's amended order as modified. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Heck's, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Unlawfully interrogating employees concerning their union membership, sympathies, or activities.

(b) Threatening employees that choice of a union as their collective-bargaining representative would lead to the closing of the store.

(c) Illegally polling employees in a nonsecret ballot election to ascertain which employees support Amalgamated Meat Cutters and Butcher Workmen of North America, Food Store Employees Union, Local No. 347, AFL–CIO.

(d) Interviewing employees under coercive circumstances concerning matters relating to unfair labor practice charges and objections to an election.

(e) Refusing to bargain with Amalgamated Meat Cutters and Butcher Workmen of North America, Food Store Employees Union, Local No. 347, AFL–CIO, as the exclusive representative of its employees in the following appropriate unit:

> All employees of the Heck's, Inc. Clarksburg, West Virginia, store, excluding supervisors, guards, and professional employees.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the

above-named labor organization as the exclusive representative of all the employees of Heck's, Inc. in the unit found to be appropriate and, if an agreement is reached, embody such understanding in a signed agreement.

(b) Post at each of its retail stores copies of the attached notice marked "Appendix," and mail a copy thereof to each of its employees. Copies of said notice, on forms provided by the Regional Director for Region 6, (Pittsburgh, Pennsylvania), after being duly signed by the representative of Heck's, Inc., shall be posted and mailed immediately upon receipt thereof, and those posted shall be maintained by Heck's, Inc. for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Heck's, Inc. to insure that said notices are not altered, defaced, or covered by any other material.

(c) Upon request of the Union, made within 1 month of the date of the Board's decision of July 1, 1971, immediately grant the Union and its representatives reasonable access for a 1-year period to its bulletin boards and all places where notices to employees are customarily posted.

(d) Upon request of the Union, made within 1 month of the date of the Board's decision of July 1, 1971, make available to the Union a list of names and addresses of all employees currently employed and keep such list current for a period of 1 year thereafter.

(e) Pay to the Union any extraordinary organizational costs which the Union incurred by reason of Heck's policy of resisting organizational efforts and refusing to bargain, such costs to be determined at the compliance stage of these proceedings.

(f) Pay to the Board and the Union the costs and expenses incurred by them in the investigation, preparation, presentation, and conduct of these cases before the National Labor Relations Board and the courts, such costs to be determined at the compliance stage of these proceedings.

(g) Notify the said Regional Director, in writing, within 20 days from the date of this Judgment, what steps Heck's, Inc., has taken to comply herewith.

David Bazelon,
Chief Judge, U.S. Court of Appeals for the District of Columbia Circuit.

Carl McGowan,
Circuit Judge, U.S. Court of Appeals for the District of Columbia Circuit.

Harold Leventhal,
Circuit Judge, U.S. Court of Appeals for the District of Columbia Circuit.

Appendix

NOTICE TO EMPLOYEES

Posted pursuant to a judgment of the United States Court of Appeals enforcing as modified an order of the National Labor Relations Board, an agency of the United States Government

After a trial in which both sides had the opportunity to present their evidence, the National Labor Rela-

tions Board has found that we violated the law and has told us to post this notice about what we are committed to do.

All our employees have the right to self-organization to form, join, or assist labor unions, and to bargain collectively through representatives of their own choosing.

We will not threaten to close any store because our employees select a union to represent them, or question our employees concerning their union sympathies, or activities, or membership, or illegally poll employees in a nonsecret ballot, or interview employees under coercive circumstances.

We will not in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

We will recognize Amalgamated Meat Cutters and Butcher Workmen of North America, Food Store Employees Union, Local No. 347, AFL–CIO, as the bargaining representative of the employees in our Clarksburg, West Virginia, store. At the request of that Union we will bargain with it in good faith with respect to the terms and conditions of employement of the employees in that store, and we will embody in a signed contract any agreement reached.

We will mail a copy of this notice to all our employees.

We will grant the Union reasonable right to utilize our bulletin boards.

We will, upon the request of the Union, immediately give to the Union a list of names and addresses

of all our employees and WE WILL keep the list current for a period of 1 year.

WE WILL reimburse the Union for any extraordinary organizational costs it incurred as a result of the unfair labor practices found by the Board.

WE WILL reimburse the Union and the National Labor Relations Board's General Counsel for their costs and expenses in connection with this proceeding.

All of our employees are free to become or remain, or refrain from becoming or remaining, members of the above-named Union, or any other labor organization.

HECK'S INC.,
(*Employer.*)

Dated__________ By______________________________
(Representative) (Title)

A true copy:

Test: Hugh E. Kline, Clerk, United States Court of Appeals for the District of Columbia Circuit.

By: MARY WATERS,
Deputy Clerk.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1536 Federal Building, 1000 Liberty Avenue, Pittsburgh, Pennsylvania 15222, Telephone 412-644-2977.

APPENDIX C

United States Court of Appeals
for the District of Columbia Circuit
Washington, D.C., 20001, May 30, 1973.

No. 71-1550—***Food Store Employees Union, etc.*** v. ***NLRB***

Marcel Mallet-Prevost, Esq.
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20570

Dear Mr. Mallet-Prevost: Enclosed is a copy of the Court's order denying your petition for rehearing.

You are further informed that your suggestion for rehearing *en banc* was transmitted to the full Court, and no Judge has requested a vote thereon.

In view of the foregoing, it is not anticipated that any further action will be taken with respect to the suggestion for rehearing *en banc*.

Yours very truly,

H. Kline
Hugh E. Kline,
Clerk.

Enc.

[Filed May 30, 1973, Hugh E. Kline, Clerk]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1550

September Term, 1972

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347 AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Before BAZELON, Chief Judge; McGOVERN and LEVENTHAL, Circuit Judges

Order

On consideration of respondent's petition for rehearing, it is

ORDERED by the Court that respondent's aforesaid petition is denied.

Per Curiam.

For the Court:

HUGH E. KLINE,
Clerk.

APPENDIX D

United States of America Before the National Labor Relations Board

HECK'S, INC.

and

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AFL-CIO

Supplemental decision and amended order

On September 24, 1968, the Board issued its Decision and Order in this case,[1] finding that the Respondent had engaged in various unfair labor practices, including a refusal to bargain in violation of Section 8(a)(5) and (1) of the Act. The Board ordered the Respondent to bargain with the Union, but found no merit in the Charging Party's request for additional extraordinary remedies. Thereafter, on May 4, 1970, the Court of Appeals for the District of Columbia Circuit enforced the Board's Order[2] against the Respondent, but remanded the case to the Board for further consideration, in light of the court's decision in *Tiidee Products*,[3] of the Union's request for

[1] 172 NLRB No. 255.

[2] *Food Store Employees Union, Local 347* v. *N.L.R.B.*, 433 F. 2d 541.

[3] *International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *N.L.R.B.*, 426 F. 2d 1243 (C.A.D.C.).

additional relief. The Board, having accepted the remand, issued a notice to the parties requesting statements of position. Such statements have been filed by the General Counsel, the Charging Party, and the Respondent.[4]

The Board has given full consideration to the views of the court of appeals, as expressed in its opinions in the instant case, the *Tiidee* case, and the *Ex-Cell-O* case.[5] The Board has also considered the parties' statements of position. For reasons more fully set forth hereinafter, the Board has concluded that it would effectuate the policies of the Act to give some but not all of the additional relief requested by the Union.

The Union seeks both monetary and nonmonetary relief. The monetary relief sought encompasses compensation for employees for loss of collective-bargaining benefits, and reimbursement of the Union for loss of dues and fees, for organizational costs, and for attorney's fees. The nonmonetary relief which it seeks includes the sending of notices to the homes of all employees at all the Company's locations; reading of the notices by Company President Haddad and Vice President Darnell to employees at all locations; granting the Union access to bulletin boards and other places where notices to employees are posted; grant-

[4] The Respondent filed a motion for oral argument and the Union filed a response in opposition to said motion. The request for oral argument is denied as, in our opinion, the record, including the parties' statements of position, adequately presents the issues and the positions of the parties.

[5] *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. N.L.R.B.*, 449 F. 2d 1046 (C.A.D.C., March 19, 1971) 449 F. 2d 1058 (C.A.D.C., June 9, 1971).

ing union organizers access to store lounges, restaurants, and parking lots; granting the use of company facilities for a union meeting at each store on company time; giving the Union lists of the names and addresses of all the Respondent's employees; and either requiring the Respondent to bargain with the Union now in a companywide unit, or requiring the Respondent to bargain without further Board proceedings in any store unit in which the Union presents a card majority. The Union also seeks an order directing the General Counsel to seek an injunction under Section 10(j) of the Act whenever a complaint is issued against the Respondent.

The General Counsel opposes reimbursement of employees for loss of collective-bargaining benefits, the award of attorney's fees, a companywide bargaining order, and an order directing him to seek injunctions under Section 10(j) of the Act. He took no position concerning reimbursement of the Union for the loss of dues and fees and with respect to the reading of notices to employees by company officials. He generally supported the Union's other requests for additional relief, although in some cases with certain reservations and qualifications.

The Respondent contends that no additional remedial provisions are warranted.

In the instant case, the Respondent violated Section 8(a)(1) of the Act by conduct which included threats, interrogations, coercive interviews, and illegal polls. The Respondent also unlawfully refused to bargain with the Union as the representative of its employees at this location in an appropriate unit. Respondent President Haddad and Vice President Darnell person-

ally participated in some of the conduct which we and the court of appeals have found violated the Act.

Viewed in isolation, the Respondent's conduct as found in this case, although serious, is not so aggravated or pervasive as to warrant additional special remedies. However, as we have had occasion to point out, in a somewhat different context with respect to this Respondent,[4] it is by now clear that Respondent's conduct here is but part of a pattern of unlawful antiunion conduct engaged in by Respondent's top officials throughout Respondent's entire operations for the purpose of denying to all of its employees the exercise of those rights guaranteed the employees by Section 7 of the Act. In such circumstances conduct at a single store such as this can no longer be viewed in isolation; Respondent's conduct must, rather, be viewed in its total context. As so viewed, Respondent's unfair labor practices are clearly aggravated and pervasive. It is, accordingly, against this background of companywide aggravated and pervasive unfair labor practices that we consider the Union's request for additional relief in this particular case.

1. Initially, we believe it appropriate to comment concerning the intended scope of our order with respect to the Respondent's violations of Section 8 (a)(1). In his decision, which the Board adopted with respect to his findings of violations of Section 8(a)(1) of the Act, the Trial Examiner, in the light of Respondent's violations at various other stores in its chain, Respondent's posting at all of its stores of telegrams concerning the results of elections or polls at

[4] See *Heck's, Inc.*, 172 NLRB No. 255.

other stores, and the participation by Respondent's top officials in these unfair labor practices, concluded that the order should be broad enough to restrain future violations of Section 8(a)(1) at any and all of the Respondent's stores. Although the Board modified the Trail Examiner's findings and conclusions to the extent of finding an unlawful refusal to bargain that the Trial Examiner did not find, the Board did not in any respect disagree with the Trial Examiner's conclusions that the remedy for the 8(a)(1) violations should be companywide. Indeed, the Board specifically adopted that portion of the Trial Examiner's order which required that the notices be posted at all of Respondent's stores. It is possible, however, that the inclusion at the beginning of the Board's Order of the store location at which these specific unfair labor practices occurred may have been interpreted as a *sub silentio* rejection of the Trial Examiner's recommendation with respect to the scope of the order. It was not so intended, and except as expressly limited therein, the order hereinafter entered shall apply to all of Respondent's employees and all of its operations wherever located.

2. With respect to the nonmonetary aspects of the requested additional relief, the basic function of an order remedying violations of Section 8(a)(1) is to assure to employees who, as here, have been subjected to interference, restraint, and coercion by their Employer with respect to their right to select their own bargaining representative, that they have a protected right to engage in such activity, free from any fear of reprisal or other employer interference, restraint, or

coercion. In the ordinary case, the posting of notices for a prescribed period is generally deemed sufficient to dispel the effects of the unlawful conduct. Here, however, upon reconsideration of this question in the light of all the factors involved, we conclude that the mere posting of notices by the Respondent at its operations is insufficient to dispel the lingering effects of its widespread and pervasive unlawful conduct. We believe, rather, that in order to dispel fully the effects of such unlawful conduct, it is necessary that the employees be able to read the notices fully and carefully, at their leisure, without fear that their interest in the contents of the notices will be noted by the Respondent and used against them; in addition, employees who are absent during the posting period should also have an opportunity to read the notices and be fully informed. This can best be accomplished by requiring that copies of the posted notices be mailed to each of the employees at his home.[7] In the circumstances here, the employees, in our opinion, can be adequately informed concerning the Government's protection of their Section 7 rights by the mailing and posting of the notices; we do not believe it necessary therefore, in this context, that the notices also be read to the assembled employees.

3. In addition, the full exercise by employees of their Section 7 rights requires that they be fully informed not only concerning those rights, but also con-

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[7] *J. P. Stevens & Co., Inc.*, 171 NLRB No. 163, enfd. 417 F. 2d 533 (C.A. 5, 1969); *Marlene Industries Corp.*, 166 NLRB 703, enfd. as modified 406 F. 2d 886 (C.A. 6, 1969); *Loray Corp.*, 184 NLRB No. 57.

cerning the advantages and disadvantages of selecting a particular labor organization, or any labor organization as their bargaining representative. The Respondent has ready day-to-day access to its employees, and has consistently used that access to minimize its employees' opportunities to make an informed decision concerning collective-bargaining representation. In order that the employees may have free and ready access to information concerning all aspects of this question, we believe it is necessary in the circumstances that the Union be given reasonable access for a 1-year period to the Respondent's bulletin boards, and other places where notices to employees are customarily posted, for the posting of union notices, bulletins, and other organization literature.[8] We also conclude that in order to neutralize the effect of the Respondent's face-to-face restraint and coercion, it is necessary that the employees have ready access to union organizers and other officials who can explain to them the Union's point of view with respect to organizational activities.

Suggested methods of accomplishing this latter objective include requiring the Respondent to furnish the Union with a list of the names and addresses of its employees, requiring the Respondent to make company facilities available for employees meetings with union representatives, and requiring the Respondent to permit nonemployee union organizers to have access to employees in parking lots, store lounges, and other places where the Respondent's

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[8] *J. P. Stevens & Co., Inc., supra.*

employees spend their time when not at work. We do not believe adoption of the two latter suggestions would be warranted unless, as is not established to be the case here, alternative means of access are clearly unavailable or have been tried and found wanting.[9] The requirement that the Respondent furnish the Union with lists of names and addresses of its employees will on the other hand facilitate contact between employees and union representatives without necessarily infringing upon the Respondent's right to control the use of its own property.[10] We conclude accordingly, that giving the Union access to the Respondent's bulletin boards, as aforesaid, and requiring that it be furnished with a list of the employees' names and addresses, which list shall be kept current for a 1-year period, will insure that the employees have the opportunity to become fully informed, in an atmosphere free of interference, restraint or coercion, concerning all matters relevant to their choice of a bargaining representative.[11]

4. We have given full and careful consideration to the Union's request for a bargaining order broader than that previously entered herein, which is applicable only to the employee unit specifically involved in this case, and which has been enforced by the court of appeals. We are not persuaded that such a bar-

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[9] *N.L.R.B. v. Babcock & Wilcox Company*, 351 U.S. 105.

[10] *J. P. Stevens & Co., supra.*

[11] We deem such access to be as necessary to dispel the effects of the Respondent's conduct in those locations where the Union is the chosen representative, as in those locations where there is no representative.

gaining order is warranted in the circumstances here presented.

Initially, we note that there is no claim that the Union represents a majority of all the Respondent's employees, or that it represents a majority in any single-location unit other than those with respect to which bargaining orders are already outstanding. Consequently, by its basic position that the Board should enter a companywide bargaining order, the Union asks the Board to do something that it has never done throughout its history: to order bargaining with a union which has at no time established its majority status in the unit in which bargaining is requested.

The fact that a specific remedy has not heretofore been applied in a particular situation during the Board's more than 35-year history is not, of course, a reason for not applying it if it is otherwise warranted; it is, however, reason to examine carefully before applying it the legal and policy considerations bearing in its applicability. Although the Respondent's unfair labor practices have been widespread, aggravated, and pervasive, they have not in our opinion been so widespread, pervasive, or aggravated as to warrant such extraordinary relief as a companywide bargaininig order not based on proof of majority. Indeed, the fact that the Union has been selected by a majority of the employees in a number of single-store appropriate units, including the unit involved in this proceeding, evidences the fact that the employees have not been wholly precluded from making their free choice. In these circumstances, and in view of the

additional relief which we have granted to facilitate the ability of the employees to make a free and unfettered choice with respect to the representation question at locations where they are not now represented, we conclude that there is no warrant for a companywide bargaining order such as that requested, assuming *arguendo* the Board's power to enter such an order.[12]

For a somewhat similar reason we reject the proposal that the Respondent should now be ordered to bargain at such time in the future when, with respect to any appropriate single-store unit, it either secures a card majority or the Respondent becomes lawfully obligated to bargain with respect to such unit; for we are not now convinced that at no time in the future will the Respondent's employees be able to make a free choice with respect to their representatives. Furthermore, we do not agree with the contention of the General Counsel and the Charging Party that such a procedure as that proposed would provide speedier relief in appropriate cases because it would bypass normal Board procedures. Unless the parties were in complete agreement with respect to all matters pertaining to the representation issue, the disagreements would have to be resolved by some tribunal. In the circumstances postulated by this latter proposal, that tribunal would be the court of appeals acting upon exceptions to a

[12] But see *J. P. Stevens & Co., Inc.*, 157 NLRB 869, 877; compare *N.L.R.B.* v. *Gissel Packing Company, Inc.*, 395 U.S. 575, 612–614.

report of a special master. There would be no guarantee that the proceedings before the special master would be any more expeditious than normal proceedings before the Board; moreover the court of appeals or its appointed special master would thereby be deprived of the Board's administrative expertise in the consideration of such disputed matter

5. Unlike most of the requests for nonmonetary relief, considered above, which presented questions of judgment as to the type of remedy that is appropriate in particular circumstances, the requests for monetary relief also require, at least in part, consideration of the Board's power to act. This is particularly true with respect to the request that the employees be made whole for loss of collective-bargaining benefits. We have in this connection fully considered the views of the court of appeals concerning the Board's power in this area, as expressed in its decisions in the *Tiidee* and *Ex-Cell-O* cases.[13] With all due respect to these views of the court, we remain convinced, as we stated in our decision in *Ex-Cell-O*,[14] that the Board lacks statutory authority to grant such relief. We will therefore adhere to our position in this matter unless and until the Supreme Court decides otherwise.

Moreover, assuming *arguendo* that we possess the necessary authority, we would nevertheless conclude that this is not an appropriate case in which to exercise such authority. In cases decided subsequent to its

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[13] See footnotes 3 and 5, *supra*.

[14] *Ex-Cell-O Corporation*, 185 NLRB No. 20. For the reasons stated in the dissenting opinion in *Ex-Cell-O*, Member Brown disagrees with this conclusion, and he would grant the *Ex-Cell-O* remedy in this case.

decision in *Tiidee,*[15] the court has held that *Tiidee* was inapplicable where the refusals to bargain rested on "debatable" issues, in contrast to the issues in *Tiidee,* which the court characterized as "patently frivolous." Here, as the Trial Examiner pointed out, in discussing the Respondent's contentions that the Union did not possess a majority in the appropriate unit, the Respondent introduced testimony which if fully credited and given its broadest possible sweep, would have resulted in the rejection of sufficient cards to have vitiated the Union's majority claim. Based on his resolutions of the credibility of the witnesses, the Trial Examiner found that the Respondent's contentions were without merit. With this finding we fully agree. As we understand the purport of the court's decisions in *Quality Rubber* and *Levi Strauss, supra,* as explicated and applied in its decisions in *Ex-Cell-O, supra,* it is not the court's view that because a defense is found to be without merit, it must necessarily be found to be "frivolous." As we understand the court's use of "frivolous" in this context, it refers to contentions which are clearly meritless on their face; the court did not, as we view its decisions, intend to label as "frivolous" a defense, the merit of which in the last analysis rests, as here and in *Quality Rubber* and *Levi Strauss,* upon a Trial Examiner's resolutions of credibility.

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[15] *Steelworkers* v. *N.L.R.B.* (*Quality Rubber Mfg. Co.*), 430 F. 2d 519 (C.A.D.C.); *Amalgamated Clothing Workers* (*Levi Strauss & Co.*) v. *N.L.R.B.*, 441 F. 2d 1027 (C.A.D.C., December 15, 1970); see also the court's June 9, 1971, decision in *Ex-Cell-O*, fn. 5, *supra.*

6. The request for reimbursement with respect to lost dues and fees also raises statutory questions relating to the applicability of section 302, which deals with restrictions on payments by employers to employee representatives. We do not, however, deem it necessary to resolve that statutory question for in our opinion there has been no predicate laid for a conclusion that the Union in fact has lost any dues or fees for reasons attributable to the Respondent's conduct. To make such a finding requires in our opinion a further finding that had the Respondent not refused to bargain, it would have entered into a union-security agreement with the Union which would have required payment of dues and fees to the Union as a condition of continued employment. While the execution of such an agreement is of course a possibility, we cannot conclude that it is so strong a probability that any loss of dues or fees must be deemed to have resulted from the Respondent's unlawful refusal to bargain.

7. Finally, there is the Union's request for reimbursement with respect to organizational costs and attorney's fees. In considering these questions we are not unmindful of the probability that the Charging Party has spent more money on organizational costs and attorney's fees than it would have spent had the Respondent not refused to bargain. It does not necessarily follow however, that the Union is entitled to reimbursement for such additional costs. In our opinion it would not on balance effectuate the policies of the Act to require reimbursement with respect to such costs in the circumstances here.

To determine the appropriateness of these reimbursement requests, we must, we believe, consider the

role of a charging party under the statutory scheme in the light of the basic principles, that Board orders must be remedial not punitive,[16] and collateral losses are not considered in framing a reimbursement order.[17] As the Supreme Court has stated,[18] the statutory scheme involves an interblending of public and private interests, and the participation of a charging party in the proceedings, before the Board and in the courts, can serve a public as well as its own private interests. Nonetheless, it is the Board which has been given primary initial responsibility to determine and protect the public interest in the elimination of obstructions to commerce resulting from labor disputes. Such protection of the public interest as may result from the charging party's participation in litigation must be regarded, we believe, as incidental to its efforts to protect its own private interests. Given this statutory framework, we conclude that the public interest in allowing the Charging Party to recover the costs of its participation in this litigation does not override the general and well-established principle that litigation expenses are ordinarily not recoverable.[19]

As we have concluded that it would effectuate the

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[16] *Republic Steel Corporation* v. *N.L.R.B.*, 311 U.S. 7, 11–12.

[17] *Gullett Gin Company, Inc.* v. *N.L.R.B.*, 340 U.S. 361, 364.

[18] *Intl. Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 283* v. *Scofield*, 382 U.S. 205, 217, *et seq.*

[19] *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714–717. Compare *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, where litigation expenses were awarded under a statute (42 U.S.C. 2000a *et seq.*) which places greater reliance on private action for the vindication of public rights.

policies of the Act to require the Respondent to take certain action in addition to the action previously ordered, we shall issue the following amended Order.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Heck's, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unlawfully interrogating employees concerning their union membership, sympathies, or activities.

(b) Threatening employees that choice of a union as their collective-bargaining respresentative would lead to the closing of the store.

(c) Illegally polling employees in a nonsecret ballot election to ascertain which employees support the Union.

(d) Interviewing employees under coercive circumstances concerning matters relating to unfair labor practice charges and objections to an election.

(e) Refusing to bargain with Amalgamated Meat Cutters and Butcher Workmen of North America, Food Store Employees Union, Local No. 347, AFL-CIO, as the exclusive representative of its employees in the following appropriate unit:

> All employees of the Respondent's Clarksburg, West Virginia, store, excluding supervisors, guards, and professional employees.

(f) In any other manner interfering with, restrain-

ing, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named labor organization as the exclusive representative of all the Respondent's employees in the unit found to be appropriate and, if an agreement is reached, embody such understanding in a signed agreement.

(b) Post at each of its retail stores copies of the attached notice marked "Appendix,"[20] and mail a copy thereof to each of its employees. Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by the Respondent's representative, shall be posted and mailed immediately upon receipt thereof, and those posted shall be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to

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[20] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

insure that said notices are not altered, defaced, or covered by any other material.

(c) Upon request of the Union, made within 1 month of the date of this Decision, immediately grant the Union and its representatives reasonable access for a 1-year period to its bulletin boards and all places where notices to employees are customarily posted.

(d) Upon request of the Union, made within 1 month of the date of this Decision, make available to the Union a list of names and addresses of all employees currently employed and keep such list current for a period of 1 year thereafter.

(e) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C.

[SEAL]

NATIONAL LABOR RELATIONS BOARD,
EDWARD B. MILLER,
Chairman.
JOHN H. FANNING,
Member.
GERALD A. BROWN,
Member.
HOWARD JENKINS, JR.,
Member.
RALPH E. KENNEDY,
Member.

APPENDIX

NOTICE TO EMPLOYEES

Posted by order of the National Labor Relations Board an Agency of the United States Government

After a trial in which both sides had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the law and has told us to post this notice about what we are committed to do.

All our employees have the right to self-organization to form, join, or assist labor unions, and to bargain collectively through representatives of their own choosing.

WE WILL NOT threaten to close any store because our employees select a union to represent them, or question our employees concerning their union sympathies, or activities, or membership, or illegally poll employees in a nonsecret ballot, or interview employees under coercive circumstances.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL recognize Amalgamated Meat Cutters and Butcher Workmen of North America, Food Store Employees Union, Local No. 347, AFL–CIO, as the bargaining representative of the employees in our Clarksburg, West Virginia, store. At the request of that Union we will bargain with it in good faith with respect to the terms and conditions of employment of the employees in that store, and we will embody in a signed contract any agreement reached.

We will mail a copy of this notice to all our employees.

We will grant the Union reasonable right to utilize our bulletin boards.

We will, upon the request of the Union, immediately give to the Union a list of names and addresses of all our employees and WE WILL keep the list current for a period of 1 year.

All of our employees are free to become or remain, or refrain from becoming or remaining, members of the above-named Union, or any other labor organization.

Heck's, Inc.,
(*Employer.*)

Dated __________ By ______________________________
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1536 Federal Building, 1000 Liberty Avenue, Pittsburgh, Pennsylvania 15222, Telephone 412—644-2977.

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